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THE CONSUMER PROTECTION FROM UNFAIR TRADING REGULATIONS: A COMMENTARY. PART ONE

David Grant and Jennifer Slade

This is the first in a series of articles in which the authors examine the Consumer Protection from Unfair Trading Regulations 2008 and their impact upon the travel industry in the UK.

Introduction

The travel industry is not immune from the criminal law. There are those members of the industry, admittedly a small minority, who have, in the past, deliberately or inadvertently, contravened the regulatory regime put in place by the Trade Descriptions Act 1968 and the Consumer Protection Act 1987. It could be by indicating that an hotel is air conditioned when it is not (*Wings v Ellis* [1984] 1 All ER 1046) or by giving the impression that a hotel was built when it was not (*R v Clarkson's Holidays Ltd* (1972) 57 Cr App R 38) or by wrongly classifying a hotel as three 'keys' when it was only one 'key' (*Direct Holidays plc v Wirral Metropolitan Borough Council* Div. Ct., April 28, 1998) or by indicating that a resort had a beach when it didn't (*Thomson Travel Ltd v Roberts* (1984) 148 JP 666) or by misleading passengers about the price they would have to pay for flights (*Essex County Council v Ryanair* (Chelmsford Crown Court, 2005; on this point see also the comments of the court in *Association of British Travel Agents & Others v British Airways & Others* [2000] 1 Lloyd's Rep. 169; aff'd [2000] 2 Lloyd's Rep. 209 where airlines were taken to task for the manner in which they calculated their fares).

The tour operator gave the impression that a hotel was built when it was not

Since May 2008 however this regulatory regime has been swept away. The Trade Descriptions Act and the pricing provisions of the Consumer Protection Act have been repealed. But before the industry rejoices at the prospect of the regulatory burden being lifted from their shoulders and replaced by self-regulation they should be aware that the old regime has simply been replaced by a new one. The UK travel industry, along with all other businesses, is now subject to the Consumer Protection from Unfair Trading Regulations 2007 (SI 2008 No. 1277) ('Consumer Protection Regulations' or 'CPR' for ease of reference).

The new regulations have been brought into force to comply with our obligations to the EU. Their origin lies in the Unfair Commercial Practices Directive (2005/29/EC). These new regulations replace the relatively detailed and specific offences of the old legislation with a more general duty to trade fairly, or rather, not to trade unfairly by indulging in 'unfair commercial practices'. Although it must be said that there are prohibitions against some quite specific unfair practices.

Interestingly the Directive is a 'maximum harmonisation' measure i.e. Member States of the EU, unlike with previous directives, cannot

provide for greater, or lesser, protection than the Directive sets out. Article 4 provides:

Member States shall neither restrict the freedom to provide services nor restrict the free movement of goods for reasons falling within the field approximated by this Directive.

This is unlike for instance the Package Travel Directive which permits Member States to bring in measures which go beyond the initial protection the Directive provides (1990/314/EC, Art. 9: "Member States may adopt or return more stringent provisions in the field covered by this Directive to protect the consumer.") The reason behind this is to ensure that there is a 'level playing field' throughout the EU – reducing costs to traders and improving consumer confidence. This rationale can be found in paragraphs three and four of the Preamble to the Directive:

The reason is to ensure that there is a 'level playing field'

(3) The laws of the Member States relating to unfair commercial practices show marked differences which can generate appreciable distortions of competition and obstacles to the smooth functioning of the internal market. In the field of advertising, Council Directive 84/450/EEC of 10 September 1984 concerning misleading and comparative advertising establishes minimum criteria for harmonizing legislation on misleading advertising, but does not prevent the Member States from retaining or adopting measures which provide more extensive protection for consumers. As a result, Member States' provisions on misleading advertising diverge significantly.

(4) These disparities cause uncertainty as to which national rules apply to unfair

commercial practices harming consumers' economic interests and create many barriers affecting business and consumers. These barriers increase the cost to business of exercising internal market freedoms, in particular when businesses wish to engage in cross border marketing, advertising campaigns and sales promotions. Such barriers also make consumers uncertain of their rights and undermine their confidence in the internal market.

It should be recognised from the outset that, as the name suggests, this is a consumer protection measure. Should confirmation of this be required authority for this can be found in Para. 1 of the Preamble to the Directive:

Article 153(1) and (3)(a) of the Treaty provides that the Community is to contribute to the attainment of a high level of consumer protection by the measures it adopts pursuant to Article 95 thereof.

As with many consumer protection measures it will of course benefit those reputable traders who already comply with the standards set out in the Regulations because their less reputable rivals will face prosecution if they fail to comply – just the kind of levelling effect the Directive aims to achieve.

The Scheme of the Regulations

For our purposes the relevant parts of the Regulations are Parts 1, 2 and 3. Part 1 is the interpretation section where many of the terms used in the latter part of the Regulations are defined. It is here that we are introduced to many of the terms that are of pivotal importance in defining the offences made illegal by the Regulations. Terms such as 'the average

consumer', 'materially distort the economic behaviour', 'transactional decision' and 'commercial practice' are introduced here – many of them very technical in nature and unfamiliar to UK practitioners.

Part 2 prohibits 'unfair commercial practices'. It then goes into more detail about what amounts to such a practice. A commercial practice is unfair if:

- It contravenes the requirements of professional diligence; and it materially distorts or is likely to materially distort the economic behaviour of the average consumer with regard to the product (Reg. 3);
- It is a misleading action (Reg. 5);
- It is a misleading omission (Reg.) 6;
- It is aggressive (Reg. 7); or
- It is listed in Schedule 1 to the Regulations.

In addition it is also an unfair commercial practice for a 'code owner' to promote unfair commercial practices in a code of conduct. This would apply to bodies such as ABTA which have formulated codes of conduct for their members. However, despite the fact that this is designated as an unfair commercial practice the Regulations do not make it a criminal offence. As the Guidance published by BERR (the Department for Business Enterprise and Regulatory Reform, now BIS, the Department for Business Innovation and Skills) comments 'Any enforcement action, if needed, will be taken through the civil route via part 8 of the Enterprise Act 2002'. (OFT 1008, p.45)

Part 3 creates the offences which relate to the prohibited commercial practices. A trader commits an offence if:

- he knowingly or recklessly engages in a commercial practice which contravenes the

requirements of professional diligence and the practice materially distorts or is likely to materially distort the economic behaviour of the average consumer with regard to the product (Reg. 8);

- he engages in a commercial practice which is a misleading action (Reg. 9);
- he engages in a commercial practice which is a misleading omission (Reg. 10);
- he engages in a commercial practice which is aggressive (Reg. 11);
- he engages in a commercial practice set out in certain paragraphs of Schedule 1 (Reg. 12).

All these offences will be examined in some detail in later articles.

Note that, apart from the first, which requires the defendant knowingly or recklessly to have committed the offence, these

are strict liability offences, requiring no *mens rea* (guilty mind) on the part of the defendant. This strictness however is mitigated by the inclusion of the 'due diligence' offence in Part 3 at Regulation 17 – in a form familiar to anyone dealing with regulatory offences, and in particular the old Trade Descriptions Act and the Consumer Protection Act.

It is an unfair commercial practice for a 'code owner' to promote unfair commercial practices

The impact on the travel industry

The big question for the travel industry is whether the regulatory burden will be greater or lesser than under the previous regime. We will have answered this question in some detail by the end of this series of articles but for the moment we will confine ourselves to some general observations. First, for those traders who

operate their businesses honestly and diligently there should be no fear of prosecution. This was always the case and it should be no different under the new regime. There may be concern that the majority of the defences are 'strict liability' offences rather than ones requiring *mens rea* as under the old Trade Descriptions Act. However the effect of the due diligence defence mitigates the strictness of the new regime, as it did where it could be invoked under the TDA. And of course the pricing offences under the old Consumer Protection Act were strict liability offences anyway.

If we look briefly at some of the old case law in the light of the new law this will give us an indication of how things may have changed, or not, as the case may be.

British Airways Board v Taylor [1976] 1 All ER 65 was a prosecution that went to the House of Lords on the issue of whether or not BOAC had made a false statement about whether a passenger had a confirmed seat on a plane. He had been issued with a confirmed reservation but on checking in he had been 'bumped' because the plane was overbooked. The case turned, not on whether BOAC *knew* that the statement was false, but whether it was false at all. Was it a false statement of fact or a promise as to the future - which could not be true or false - and therefore not contrary to s.14 of the TDA? The House of Lords held it was the former and the airline was convicted. Today the prosecution would be brought under Reg. 9 which makes it an offence to engage in a misleading action as defined in Reg. 5. On the face of it to issue a confirmed reservation that a passenger has a seat on a plane when this was not necessarily the case, because a denied boarding policy was in place, would be a misleading action under Reg. 5. It is a misleading action if the statement is false (the issue in the *British Airways* case) or if its overall

presentation deceives or is likely to deceive the average consumer about 'the availability of the product' (Reg. 5(2)(a) and Reg. 5(5)(a)). Unless the defendant could raise the due diligence defence, they would be convicted of an offence under Reg. 9. Therefore the outcome of a similar case under the new regime, is likely to be the same - either because the statement would be regarded as false or because it could be regarded as deceptive. The legislation seems to give the prosecutor more options. And, unlike the TDA, the offence could be committed without *mens rea*.

Wings v Ellis [1984] 1 All ER 1046, was a prosecution under s.14 of the TDA. The facts of the case were that the defendant tour operator, Wings, published a brochure in early 1981 advertising

holidays for the 1981-82 season. Unfortunately there was a mistake in the brochure. It stated that a particular hotel had air-conditioning when in fact it did not. Wings did not discover this until May 1981. At that point they issued errata to all existing clients

and instructed all telephone sales staff to inform travel agents and prospective clients of the error before bookings were made. At least one client, however, was not told of the lack of air-conditioning before travelling. On return he complained to his local trading standards department who subsequently brought a prosecution under section 14(1)(a). Under that section it is an offence for a person 'to make a statement which he knows to be false'. The problem was that Wings knew the statement was false but they didn't know they were making it. Ultimately the case made its way to the House of Lords on the difficult issue of whether Wings could be convicted when, in reality, they had no *mens rea*. In convicting Wings the House of Lords conceded that although this was a case normally requiring *mens rea* a literal interpretation of the offence turned it into one of 'semi-strict liability' (Lord Scarman).

The passenger was 'bumped'
because the plane was
overbooked

On the face of it a prosecution may be easier under the new regime. Such a statement would be a misleading action under Reg. 5 giving rise to an offence under Reg. 9 and no knowledge or recklessness would have to be proved by the prosecution to establish a *prima facie* offence had been committed. However, if the defendant had acted with all due diligence then they would have a workable defence under Reg. 17 – as Wings would have had if they had chosen to raise it. That they didn't choose to raise it was probably because it wouldn't have worked – their 'due diligence system' would not have survived scrutiny.

On this brief initial review it appears that framing the offence may be easier and that a trader, having made a misleading statement would have to fall back on the due diligence defence to escape prosecution.

Concurrent Liability

It should not be forgotten that large parts of the travel industry are subject to both the Package Travel Regulations 1992 and to the ATOL Regulations 1995 (as amended) which create

other criminal offences and which are both in the process of being reviewed. The ATOL Regulations in particular have attracted recent judicial attention and provided the incentive for their review (See *ABTA v CAA* [2006] EWCA Civ 1299 and *CAA v Travel Republic Ltd*, Westminster Magistrates' Court, 10 November, 2009).

And of course there is still the possibility of civil liability. False or misleading statements which can be prosecuted under the criminal law are also likely to amount to misrepresentation or breach of contract in the civil law giving rise to compensation for the victim.

The Next Articles

In the next in the series of articles we will begin looking at some of the crucial definitions and this will be continued in the following article. We will then move on to look at the different

offences and at the defence. Finally we will examine some case studies to give an idea of how the law might work out in practice.

A prosecution may be easier
under the new regime
